IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1660

TERRELL DON HUTTO, *et al.*,

Petitioners,

—v.—

ROBERT FINNEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
EIGHTH CIRCUIT COURT OF APPEALS

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, ACTION ON SMOKING AND HEALTH, THE CHILDREN'S DEFENSE FUND, CONCERNED CITIZENS FOR JUSTICE, CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., THE COUNCIL FOR PUBLIC INTEREST LAW, EQUAL RIGHTS ADVOCATES, THE FOOD RESEARCH AND ACTION CENTER, THE INDIANA CENTER ON LAW AND POVERTY, THE LAWYERS MILITARY DEFENSE COMMITTEE, THE LOS ANGELES CENTER FOR LAW IN THE PUBLIC INTEREST, THE MASSACHUSETTS ADVOCACY CENTER, THE MENTAL HEALTH LAW PROJECT, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE MIGRANT LEGAL ACTION PROGRAM, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL COUNCIL OF SENIOR CITIZENS, THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, THE NATIVE AMERICAN RIGHTS FUND, OFICINA LEGAL DEL PUEBLO UNIDO, THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, THE RUTGERS UNIVERSITY CONSTITUTIONAL LITIGATION CLINIC, THE SAN FRANCISCO LAWYERS COMMITTEE FOR URBAN AFFAIRS, THE SOUTHERN POVERTY LAW CENTER, TAX ANALYSTS AND ADVOCATES, THE UNIVERSITY OF MARYLAND DEVELOPMENTAL DISABILITIES PROJECT, THE UNIVERSITY OF MICHIGAN CLINICAL LAW PROGRAM, THE WESTERN LAW CENTER FOR THE HANDICAPPED, THE WISCONSIN CENTER FOR PUBLIC REPRESENTATION, THE WOMEN'S LAW PROJECT, and THE YOUTH LAW CENTER, *Amici Curiae*

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TABLE OF CONTENTS

Cases: Page

INTEREST OF AMICI CURIAE

Amici are thirty-one organizations providing legal representation for interests that historically have been unrepresented or under-represented:

AMERICAN CIVIL LIBERTIES UNION. The ACLU is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the safeguards of the Bill of Rights.

ACTION ON SMOKING AND HEALTH serves as the "legal arm" of the anti-smoking population, working on the establishment of smoking and non-smoking sections in public places and the removal of cigarette commercials from radio and TV.

THE CHILDREN'S DEFENSE FUND works on national social policy issues as they affect children. Its program priorities include the right to an education, a child's

right to privacy, health care, juvenile justice, rights of children to comprehensive development services, and the protection of children used as research subjects.

CONCERNED CITIZENS FOR JUSTICE is a small community-based legal services and law reform project in southwestern Virginia. It works on consumer protection, occupational health and safety, and welfare benefit issues.

CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., provides representation for challenges to discriminatory practices against women in such areas as employment, education, credit, and insurance.

THE COUNCIL FOR PUBLIC INTEREST LAW, created under the joint sponsorship of the American Bar Association and three foundations active in supporting public interest law, works to foster the growth of public interest law by developing and distributing

detailed information about the financing and activities of various public interest legal organizations.

EQUAL RIGHTS ADVOCATES specializes in the area of sex discrimination, including employment, health care, and prison reform issues.

THE FOOD RESEARCH AND ACTION CENTER specializes in food benefit matters. Issues of importance include food stamp benefits, national school breakfast and lunch programs, and special nutrition programs for pregnant women, infants, and children.

THE INDIANA CENTER ON LAW AND POVERTY, INC. provides policy-oriented representation to Indiana's poor on such issues as welfare benefits , utility rate reform, employment, and criminal justice.

THE LAWYERS MILITARY DEFENSE COMMITTEE provides free civilian counsel for American servicemen overseas.

THE LOS ANGELES CENTER FOR LAW IN THE PUBLIC INTEREST provides representation on a variety of issues, particularly environmental protection, corporate accountability and employment discrimination.

THE MASSACHUSETTS ADVOCACY CENTER addresses educational and other social welfare issues affecting children throughout the state. Its priorities include the right to an education, special education, child health, protection of children used as research subjects, the juvenile justice system, and access to public information.

THE MENTAL HEALTH LAW PROJECT works to protect the rights of the mentally impaired. Its docket includes cases establishing a patient's right to treatment, challenging the use of patients as unpaid

laborers, challenging civil commitment procedures, and establishing the right of mentally handicapped children to a public education.

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND works on behalf of Mexican American citizens; its area of heaviest concentration concerns equal rights in employment, education and voting.

THE MIGRANT LEGAL ACTION PROGRAM works on a range of issues on behalf of migrant workers, including housing, welfare benefits, health care, and occupational safety and health.

THE NATIONAL CONFERENCE OF BLACK LAWYERS is a bar association with an active public interest law program. Most of its public interest work concerns criminal justice reform, but it also works to eliminate discriminatory practices in education, employment, and in the military.

THE NATIONAL COUNCIL OF SENIOR CITIZENS represents the interests of the elderly before federal, state, and local administrative agencies.

THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS works exclusively to reform or eliminate state, local or national laws regarding the use of marijuana. Issues of concern include the employment of marijuana users, medical prescription of the drug, and the private possession of small quantities of marijuana.

THE NATIVE AMERICAN RIGHTS FUND is a national Indian Law firm. Its priorities include protecting Indian treaty rights, insuring the independence of Indian tribes, protecting Indian lands, water, minerals, and other natural resources, civil rights, and governmental accountability. NARF also functions as a Legal Services support center on Indian law.

OFICINA LEGAL DEL PUEBLO UNIDO engages in litigation and community legal education on behalf of the interest of farm workers.

THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA provides representation in a broad range of issue areas on behalf of various disadvantaged minority clients within Philadelphia and the state. It is concerned with juvenile justice, employment discrimination, health care, the rights of the mentally and physically handicapped, and other issues.

THE RUTGERS UNIVERSITY CONSTITUTIONAL LITIGATION CLINIC challenges unconstitutional practices and laws which infringe upon people's rights, such as the unequal allocation of public funds for education in the state, government misconduct, and employment discrimination.

THE SAN FRANCISCO LAWYERS COMMITTEE FOR URBAN AFFAIRS provides representation for various disadvantaged minorities and poor persons on such issues as voting rights, employment discrimination, educational opportunities, and criminal justice reform.

THE SOUTHERN POVERTY LAW CENTER works through litigation directed at enforcing and protecting the civil rights of the South's rural poor. It concentrates on criminal justice reform and has a "death penalty" project aimed at overturning death penalty statutes and eliminating death sentences.

TAX ANALYSTS AND ADVOCATES, concerned solely with federal tax reform, works to insure that the IRS is fairly implementing the tax laws and that citizens' interests are represented in the decision-making process. It also provides analysis on tax policy and tax issues.

THE UNIVERSITY OF MARYLAND DEVELOPMENTAL DISABILITIES PROJECT is a law reform program whose purpose is to advocate on behalf of developmentally disabled (mentally retarded, cerebral palsied, epileptic, autistic, and other severely disabled) persons.

THE UNIVERSITY OF MICHIGAN CLINICAL LAW PROGRAM provides legal services to indigent persons in the Ann Arbor area.

THE WESTERN LAW CENTER FOR THE HANDICAPPED provides legal services to handicapped persons for problems involving their disabilities.

THE WISCONSIN CENTER FOR PUBLIC REPRESENTATION, Wisconsin's only autonomous public interest law center devoted entirely to policy-oriented representation, directs its attention to such matters as equal rights for ex-offenders, fair credit standards for women, land use policy, governmental accountability, health care issues,

and corporate responsibility.

THE WOMEN'S LAW PROJECT (Philadelphia) works to implement federal and state equal rights amendments, and to challenge discrimination in employment, education, family planning, and health care.

THE YOUTH LAW CENTER works on behalf of children in the western half of the country. Areas of concern include juvenile law, mental health law, the rights of juvenile offenders, education law, and conditions in juvenile institutions.

* * *

Although Amici provide representation for a variety of individuals and groups espousing widely varying viewpoints, they have a common, overriding concern: important constitutional rights, and statutory rights secured through successful exercise of the political process, are daily rendered nullities for lack of enforcement.

Congress shares this concern. The Senate Report recommending passage of the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 42 U.S.C. §1988, states:

> "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." See also H. Rep. No. 94-1558, 94th Cong., 2d Sess., p. 1. S. Rep. No. 94-1011, 94th Cong., 2d Sess. p. 1.

Congress enacted P.L. 94-559 in order to facilitate enforcement of the civil rights it had labored so long to secure, by enabling people without means to employ skilled attorneys. Amici public interest legal organizations and the persons they represent are thus the intended beneficiaries of P.L. 94-559. Their interest is substantially the same as the Congressional interest: they seek to provide persons whose rights have been violated and who cannot afford legal counsel with "effective access to the judicial process where their grievances can be resolved according to law." (H. Rep. No. 94-1558, 94th Cong., 2d Sess., p. 1).

This brief will argue that Congress carefully followed the analysis suggested in prior decisions of the Court in seeking to accomplish this important goal. Amici urge the Court to resolve the issues presented in light of Congress' broad remedial purpose.*

* As the Court has been informed in a letter to the Clerk, Amici have received consent from both parties to file this brief.

Statement of the Case

After ten years of litigation devoted to establishing minimum standards of decency in the Arkansas prison system, the United States District Court for the Eastern District of Arkansas awarded $20,000 to plaintiffs' court appointed counsel as a reasonable fee for services rendered during a segment of the litigation. In addition, the District Court directed that other costs be assessed in favor of the plaintiffs. The fees and costs were both assessed against the Arkansas Department of Correction, which receives its funding from the State of Arkansas.[1] The District Court

1 The Arkansas Department of Correction was not named as a party-defendant in the District Court, presumably because plaintiffs feared it would not be deemed a "person" within the meaning of 42 U.S.C. §1983. However, the Commissioner of Correction of Arkansas and other officials who, collectively, constituted the upper echelons of the Department were named as individual defendants and the action was defended by the Attorney General of Arkansas. [Footnote Continued]

based its power to award attorney's fees first, on the Civil Rights Attorney's Fees Awards Act of 1976(P.L. 94-559;42 USC §1988), and second, on the "bad faith" exception to the American rule on attorney's fees recognized in Aleyeska Pipeline Service Company v. Wilderness Society, Inc., 421 U.S. 240 (1975) (hereafter, Aleyeska). The Eighth Circuit noted ample evidence in the record to support an award under the "bad faith" exception, but rested its affirmance on the 1976 Act. Finney v. Hutto, 548 F. 2d 740, 742 (8th Cir. 1977).

[Footnote 1 Continued]

Since the individual defendants are "persons" within the meaning of 42 U.S.C. §1983 and since Ex parte Young,209 U.S. 123 (1908) holds that state officials acting outside the scope of the Federal constitution are not entitled to Eleventh Amendment immunity, the District Court possessed unquestioned power to grant prospective relief on the merits, despite its obvious impact on the State of Arkansas.

Despite the active participation of the State of Arkansas in defending the litigation in the District and Circuit Courts, and despite the substantial benefits which inure to the people of Arkansas as a direct result of the elimination of barbaric and unconstitutional practices from the Arkansas penal system, petitioners contest the power of the District Judge to award reasonable attorney's fees against the Arkansas Department of Correction.[2] However, neither the Eleventh Amendment nor

2 Petitioners do not contest the amount of the award, apparently recognizing that it is an extremely reasonable fee for the time, energy and expertise expended by plaintiffs' counsel. Nor do petitioners contest the award of costs. The District Court's award of $2,000 in costs tracked the provisions of Rule 54(d) F.R.C.P. Recognizing that Fairmont Creamery Company v. Minnesota, 275 U.S. 70 (1927), clearly authorizes such an award, petitioners do not contest it in this Court.

any other impediment precluded the District Court from requiring the Arkansas Department of Correction to absorb a portion of the unavoidable economic costs of constitutional adjudication.

SUMMARY OF ARGUMENT

Amici contend that the award of reasonable attorney's fees against the Arkansas Department of Correction was not barred by the Eleventh Amendment (Point I.).

The Eleventh Amendment was designed only to preserve sovereign immunity as it existed in 1789, and was not designed as a new, independent and affirmative basis for sovereign immunity (Point I.A.).

The Court has recognized three methods for restricting the sovereign immunity preserved by the Eleventh Amendment: inherent surrender, individual waiver, and Congressional override (Point I.B.).

Those methods, as applied in the circumstances of this case, justify an award of attorney's fees against the Arkansas Board of Correction (Point I.C.).

Specifically, Congress has determined that attorney's fees are a part of costs, and this Court has ruled that the Eleventh Amendment does not preclude an award of costs against a state entity (Point I.C.1). Relying on its power under section 5 of the Fourteenth Amendment, Congress has expressly overridden sovereign immunity with respect to fee awards in civil rights cases (Point I.C.2). And the "bad faith" of the state defendants in failing to implement a lawful district court order jeopardized the integrity and supremacy of federal court orders, and therefore justified an award of attorney's fees for services necessary to implement the order (Point I.C. 3).

ARGUMENT

I. THE AWARD OF REASONABLE ATTORNEY'S FEES AGAINST THE ARKANSAS DEPARTMENT OF CORRECTION WAS NOT BARRED BY THE ELEVENTH AMENDMENT

A. The Scope of Sovereign Immunity Preserved by the Eleventh Amendment.

Read literally, the limitation on "the judicial power of the United States" imposed by the Eleventh Amendment is both unduly narrow and unduly broad. Literally,

the Eleventh Amendment bans only suits against a state by citizens of another state, leaving states vulnerable to Federal actions brought by their own citizens.[3] Conversely, a literal reading of the Eleventh Amendment would preclude a state

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3 The "narrow" literal reading of the Eleventh Amendment was rejected in Hans v. Louisiana, 134 U.S. 1 (1890) and has been rejected by a majority of the current Court. Eg. Edelman v. Jordan, 415 U.S. 651 (1974). Mr. Justice Brennan has consistently urged the "narrow" literal reading. Eg. Edelman v. Jordan, 415 U.S. 651, 687 (1974) (dissenting). However, Mr. Justice Brennan's recognition that state sovereign immunity exists as a bar to a suit in a Federal court independently of the Eleventh Amendment renders the practical result of his position similar to the non-literal reading espoused by the majority and discussed infra. Under both approaches, the determinative element is not the literal wording of the Eleventh Amendment, but the judge-made doctrine of state sovereign immunity.

from consenting to be sued in Federal court, and might well bar Supreme Court appellate review of cases involving states as parties-defendants.[4]

Accordingly, instead of a literal reading, this Court has construed the Eleventh Amendment to advance its historic purpose--overruling the rationale of Chisholm v. Georgia, 2 Dall. 419 (1783). In Chisholm, a majority of the Court ruled that the language of Article III of the Constitution placing controversies between a state and the citizens of another state within the judicial power of the United States

4 The "broad" literal reading of the Eleventh Amendment has never commanded respect, and has been implicitly rejected by the Court in numerous cases recognizing that a state may consent to be sued in Federal court, Eg. Clark v. Barnard, 108 U.S. 436 (1883); Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), and in numerous cases entertaining Supreme Court appeals from state court decisions in which a state is a party.

effected a waiver of state sovereign immunity.[5] In his dissent in Chisholm, Justice Iredell argued that the states, in ratifying Article III, had not intended to waive sovereign immunity over all controversies described in Article III. Instead, he argued, traditional pre-1789 notions of sovereign immunity survived the adoption of Article III. In the outcry which followed the announcement of the Court's decision in Chisholm, it became clear that

5 Chisholm involved a suit in assumpsit by South Carolina executors of a British creditor of the State of Georgia. Much of the controversy during the 1790's surrounding the jurisdiction of Federal courts over state defendants involved a concern over the extent to which Federal courts would be permitted to dictate the conditions under which state Revolutionary War debts were to be re-paid. The irony of British creditors suing to enforce Georgia's Revolutionary War debt seemed lost on the participants in Chisholm. Feeling against the Chisholm decree ran so high in Georgia that the legislature made it a felony punishable by death without benefit of clery to seek to enforce the Court's mandate in Chisholm.

Justice Iredell's understanding of the intent of the states in ratifying Article III was correct. Accordingly, the Eleventh Amendment was drafted and ratified to make clear that the mere adoption of Article III had not acted to override the sovereign immunity enjoyed by the states prior to the ratification of the Constitution.

Viewed in historical context, therefore, the apparently overly narrow and overly broad literal wording of the Amendment becomes understandable. Its narrowness is attributable to the fact that the precise holding of Chisholm involved a suit by a citizen of South Carolina against the State of Georgia pursuant to the language of Article III placing such "diversity" suits within the judicial power of the United States. Thus, the Amendment was couched in terms of the "diversity" power in order to rebut the notion that the "diversity" language had effected a waiver of sovereign immunity. Its breadth is attributable to the desire of the draftsmen to "erase" the notion that merely because a claim fell

within the judicial power of the United States as described in Article III, state sovereign immunity against that claim was destroyed by the operation of Article III. Because Chisholm had adopted that rationale, the draftsmen of the Eleventh Amendment sought to rebut it by removing the category of claims in question from "the judicial power of the United States."[6]

Read in terms of its purpose, therefore, the Eleventh Amendment merely "erases" the notion that the ratification of Article

6 Given the jurisdictional provisions of the Judiciary Act of 1789, little if any concern was paid by the draftsmen of the Eleventh Amendment to cases arising un-under the Constitution or laws of the United States, since general Federal question jurisdiction was not granted to the lower Federal courts until 1875. Indeed, it is possible to argue persuasively that Federal question cases were not intended to be within the coverage of the Eleventh Amendment at all. Cohens v. Virginia, 6 Wheat. 264 (1821). But see Governor of Georgia v. Medrazo, 1 Pet. 110 (1828); Hans v. Louisiana, 134 U.S. 1 (1896).

III by the states constituted a total waiver of state sovereign immunity against all claims falling within the judicial power of the United States. Thus, this Court has properly viewed the Amendment not as a new, independent, and affirmative bar to the assertion of subject matter jurisdiction by the Federal courts; but rather as a negative bar which simply preserves the states' pre-1789 sovereign immunity from repeal by implication at the hands of Article III.[7]

B. Recognized Methods for Restricting Sovereign Immunity.

The Court has recognized three methods by which pre-1789 state sovereign immunity, as preserved by the Eleventh Amendment, may be restricted.

7 Since "local" entities did not enjoy sovereign immunity under pre-1789 standards, the Court has consistently declined to afford municipalities or other local organs of government Eleventh Amendment immunity. [Footnote Continued]

1. "Inherent Surrender" as a Restriction of Pre-1789 Sovereign Immunity.

First, the Court has recognized that in electing to join a Federal union, the states inherently surrendered certain aspects of pre-1789 sovereign immunity.[8] Thus, the Court has long held that actions in Federal court by the United States against a state defendant are not barred by surviving concepts of sovereign immunity since in joining a Federal union states of necessity surrendered sovereign immunity vis a vis the United States. Compare, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (recognizing immunity

[Footnote 7 Continued]
Eg. Lincoln County v. Luning, 133 U.S. 529 (1890); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). Amici assume the Arkansas Board of Correction is an Eleventh Amendment entity, although the issue is not free from doubt.

8 See generally, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); the Supremacy Clause, Article VI, clause 2; and The Federalist, No. 81.

against suits by foreign states) with United States v. Texas, 143 U.S. 621 (1892) (rejecting immunity against suits by the United States). See also, United States v. Maine, 420 U.S. 515 (1975); United States v. Mississippi, 380 U.S. 128, 138-141 (1965); United States v. California, 297 U.S. 175 (1936). Similarly, this Court has long entertained appeals from state courts despite the presence of state party defendants, because in joining a Federal union, states of necessity surrendered sovereign immunity in cases involving appellate review by the Supreme Court. Cf. Cohens v. Virginia, 6 Wheat. 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). Moreover, this Court has recognized that by joining a Federal union, states of necessity surrendered sovereign immunity against prospective equitable relief aimed at compelling future adherence to Federal constitutional norms. Eg. Ex parte Young, 209 U.S. 123 (1908). Finally, this Court has long recognized that costs may be imposed by a Federal court upon a state without

violating the Eleventh Amendment, because in joining a Federal union, states of necessity surrendered sovereign immunity against the allocation of reasonable dispute-resolution expenses incurred in resolving cases within the jurisdiction of the Federal courts. Eg., Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927).

2. Individual Waiver as a Restriction of Pre-1789 Sovereign Immunity

Second, this Court has recognized that a state may, if it wishes, waive aspects of its sovereign immunity, and consent to suit in cases that appear barred by the literal language of the Eleventh Amendment and which cannot be classified as within the "inherent surrender" concept discussed supra. Eg., Clark v. Barnard, 108 U.S. 436 (1883); Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964). Such "consents" to suit may be explicit, or may

be manifested by the conduct of individual states.

3. Congressional Override as a Restriction of Pre-1789 Sovereign Immunity

Third, this Court has recognized that state sovereign immunity, as preserved by the Eleventh Amendment, is subject to collective override(or collective waiver) by the representatives of the state sitting as the Congress of the United States; at least when the override or waiver is linked to the enforcement of Fourteenth Amendment rights. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).[9] See also, Tribe," Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism," 89 Harv. L. Rev. 682 (1976).

9 Whether Congress may override Eleventh Amendment immunity acting pursuant to other provisions of the Constitution is an open question. But given the explicit reliance by Congress in enacting the attorney's fees [Footnote Continued]

C. In The Circumstances of this Case, Sovereign Immunity Does Not Preclude An Award of Attorney's Fees Against the Arkansas Board of Correction.

In the circumstances of this case, the sovereign immunity preserved by the Eleventh Amendment has been restricted under the doctrines of inherent surrender and Congressional override.

1. Congress has determined that attorney's fees are a part of costs, and the Eleventh Amendment does not preclude an award of costs against a state entity.

[Footnote 9 Continued]
provisions of P.L. 94-559 on Section 5 of the Fourteenth Amendment, (see discussion infra),it is unnecessary in this case to explore whether Congress possesses override power pursuant to other sections of the Constitution or whether Courts possess power under Section 1 of the Fourteenth Amendment to imply constitutionally based causes of action which override the Eleventh Amendment. See generally, Ex parte Young, 209 U.S. at 148-149; Edelman v. Jordan, 415 U.S. 651, 694 n. 2 (1974) (Mr. Justice Marshall, dissenting).

Resolution of the Eleventh Amendment question in this case is controlled by applicable and settled precedents of this Court. It is settled that the Eleventh Amendment does not bar the assessment of costs against a state entity. Fairmont Creamery v. Minnesota, 275 U.S. 70, 74 (1927). As the Court recognized in Fairmont, the states inherently surrendered sovereign immunity with respect to litigation costs in federal courts (275 U.S. at 74).

It is equally settled under Aleyeska, supra, that Congress has the power to define costs (421 U.S. at 250-257).[10]

10 In Aleyeska, the Court noted (pp. 250-257) that in 1842, Congress delegated that power to the Supreme Court only to reassert the power again in 1853 in a statute including carefully limited attorney's fees as costs. The Court "repeatedly enforced" that Act. At present, various sections of the United States Code embody the exercise of Congressional power to define particular items as costs, E.g., 28 U.S.C. §1920 and §1923(a); 15 U.S.C. §78i(e); 33 U.S.C. §1365(d).

Congress has exercised that power and has specified in P.L. 94-559 that attorney's fees may be awarded "as part of the costs." Accordingly, even without reference to the legislative history of P.L. 94-559, it is clear under Fairmont and Aleyeska that the Eleventh Amendment does not preclude an award of attorney's fees as part of costs against a state entity.

Reference to legislative history shows that the decision to characterize attorney's fees as part of costs was not accidental, and that Congress expressly cited and relied upon both Fairmont and Aleyeska to ensure that attorney's fees would not be barred by the Eleventh Amendment.[11]

11 E.g., S. Rep. 94-1011,94th Cong., 2d Sess., p. 4, p. 5, note 6; and H. Rep. 94-1558, 94th Cong., 2d Sess., p. 2. Congress also cited Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and may well have relied on the concurring opinion of Mr. Justice Stevens, in which he "would place
[Footnote Continued]

2. Congress has expressly overridden sovereign immunity in cases falling within the coverage of the civil rights attorney's fees awards act of 1976.

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court recognized that Congress has power, pursuant to Section 5 of the Fourteenth Amendment, to override the sovereign immunity preserved by the Eleventh Amendment. In enacting P.L. 94-559, Congress expressly relied upon that power in order to authorize attorney's fees awards against state entities.

In Fitzpatrick, plaintiffs sued state officials for relief that would indisputably flow from the state treasury. The state was

[Footnote 11 continued]
fees in the same category as other litigation costs," citing Fairmont. 49 L. Ed. 2d. at 624. See H. Rep. 94-1558, 94th Cong., 2d Sess., p. 7 note 14.

not named, but the Eleventh Amendment issue was raised. There was no dispute that a fee award against state officers acting in their official capacity was equivalent to an award directly against the state. Cf. Edelman v. Jordan, 415 U.S. 651 (1974). The Court held that the Eleventh Amendment was overridden by the 1972 amendments to the 1964 Civil Rights Acts (42 U.S.C. 2000e (a)), enacted under the authority of Section 5 of the Fourteenth Amendment. Attorney's fees were awarded pursuant to a statutory provision identical to P.L. 94-559, 42 U.S.C. §2000e-5(k), see Fitzpatrick, 49 L. Ed. 2d at 618 note 6.

To the extent that Congress has authorized relief against Eleventh Amendment entities pursuant to §5 of the Fourteenth Amendment, Fitzpatrick holds that sovereign immunity is no bar. Fitzpatrick, 49 L. Ed. 2d at 619. In Fitzpatrick, the Civil Rights Act of 1964 as amended authorized a compensatory award and attorney's fees against state officials to be paid out

of the state treasury. Here, although Congress has not provided for an award of compensatory damages directly against the state treasury, P.L. 94-559 has clearly provided the necessary "threshold authorization", Fitzpatrick, 49 L. Ed. 2d at 619, for a fee award against state entities. Fitzpatrick therefore squarely supports the fee award here.

The legislative history of P.L. 94-559 shows conclusively that Congress intended to use its power under §5 of the Fourteenth Amendment to abrogate state sovereign immunity under the Eleventh Amendment. The Senate Report, for example, concludes as follows:

> " Fee awards are therefore provided in cases covered by S. 2278 [P.L. 94-559] in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, §5. As with cases brought under 20 U.S.C. §1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys fees, like other items

> of costs, will be collected either directly from the official, in his official capacity, from the funds of his agency or under his control, or from the State or local government (whether or not the agency of government is a named party)." S. Rep. 94-1011, 94 Cong. 2d Sess., p. 5 (June 18, 1976). (Footnotes omitted; citing Fairmont Creamery v. Minnesota, 275 U.S. 168 (1927)).

Similarly, the House Report,[12] issued three months after the Senate Report, cites Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) for the proposition that fees may be collected from defendant state officials in their official capacities and that awards may be granted against state entities:

> "The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." (H. Rep., p. 7) (footnote omitted).

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12 H. Rep. 94-1558, 94th Congress 2d Sess., Sept. 15, 1976.

The footnote to that statement provides as follows:

> " Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. Fitzpatrick v. Bitzer, ____ U.S. ____, 96 S. Ct. 2666 (June 28, 1976)." (Id., note 14).

And in the House debates Representative Drinan, a sponsor of the bill, expressly characterized the bill as an abrogation of Eleventh Amendment immunity under Congressional authority granted in §5 of the Fourteenth Amendment[13] . That characterization was never questioned or disputed.

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13 "The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th amendment. That amendment limits the power of the Federal courts to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick against Bitzer. Since this bill is enacted pursuant to the power of Congress under section 2 of the
[Footnote Continued]

To assure that this intent would be effectuated, Congress intentionally and expressly "tracked" the language of P.L. 94-559 to parallel the language of 42 U.S.C. 2000e-5(k), the section at issue in Fitzpatrick.[14] Like P.L. 94-559, 42 U.S.C.

[Footnote 13 Continued]
13th Amendment and section 5 of the 14th amendment, any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants." 122 Cong. Rec. No. 151 part II, Daily Ed., October 1, 1976, p. H. 12160.

14 H.R. No. 94-1558, 94 Cong. 2d Sess. p. 5 and fn. 11. The House Report also emphasizes that Congress cast P.L. 94-559 in a mold that had already successfully passed judicial scrutiny. It states:

> "Keeping with that pattern [of awarding attorney's fees in other statutes], H.R. 15460 [P.L. 94-559] tracks the language of the counsel fee provisions of Title II and VII of the Civil Rights Acts of 1964 and Section 402 of the Voting Rights Act amendments of 1975." [Footnotes omitted]. H. No. 94-1558, 94 Cong. 2d Sess. 1976, p. 5 and fn. 11.

See, to the same effect, the Senate Report, which states:

> "S. 2278 [P.L. 94-559] follows the language of Title II and VII of the Civil Rights Act of 1974, 42 U.S.C. 2000a-3(b) and 2000e-5(k) and Section

[Footnote Continued]

2000e-5(k) authorizes awards of attorney fees to a "prevailing party." Thus, although the nature of the defendant--individual, official or state--is not specified in either statute, the Senate and House Reports show Congress believed that if Congress used the language approved in Fitzpatrick, the clear Congressional intent to override Eleventh Amendment prohibitions when state officials are defendants would not be questioned.

Finally, the language of P.L. 94-559 is comparable to the text of the Supreme Court rule in Fairmont Creamery v. Minnesota, 275 U.S. 70 (1927), which was held to authorize the imposition of costs against the State of Minnesota. See supra Point I.C. 1. In Fairmont, the Court noted that no exception existed in the text of the rule to accomodate a claim of state sovereign immunity. Accordingly, the Court

[Footnote 14 Continued]
402 of the Voting Rights Act Amendments of 1975." S.R. 94-1011, 94th Cong. 2d Sess., p. 2.

applied the rule literally to preclude a sovereign immunity claim advanced by Minnesota. Similarly, no such exception exists in the text of P.L. 94-559, and since its legislative history precludes such an exception, the Court should read P.L. 94-559 as authorizing awards against state entities.[15]

15 The Senate Report is consistent with the rest of the legislative history on this point. Furthermore, it emphasized this point by citing Fairmont Creamery. S. Rep. 94-1011, 94 Cong. 2d Sess., p. 5 (June 18, 1976). The Senate Report may also be viewed as relying on federal ancillary jurisdiction as a basis for an attorney fee award:

> " In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such complaince." S. Rep., p. 5.

This approach to an attorney's fees award against a non-party who has been part of the litigation from its inception was approved in Grimes v. Chrysler Motors Corp., ____ F. 2d ____ (No. 77-7247, 2nd Cir. slip opinion Nov. 17, 1977). See, to the same effect, Maynard v. Wooley, ____ F. Supp. ____ (D.N.H. Civil Action No. 75-57,
[Footnote Continued]

In short, the legislative history of P.L. 94-559 clearly manifests Congressional authorization of fee awards against state entities. And where, as in this case, a statute by its terms changes the rule of a recent Supreme Court decision, separation of powers and deference to a coordinate branch of government require the Court to examine and heed the legislative history of that statute in order to give it full effect. See United States v. American Trucking Association, 310 U.S. 534 (1939); Hart and Sachs, Legal Process, pp. 1243-1286 (1958).[16]

[Footnote 15 Continued]
Memorandum Opinion of Sept. 26, 1977), in which Circuit Court judges Coffin and (now) Bownes, and District Judge Gignoux awarded attorney's fees against New Hampshire, a non-party.

16 The legislative history also shows that Congress sought to encourage private enforcement of the civil rights acts by specifying that prevailing plaintiffs would routinely recover attorney's fees, whereas prevailing defendants would recover fees only if the litigation "was clearly frivalous, vexatious, or brought for harrassment purposes." S. Rep., supra, at 5. Compare EEOC v. Christiansburg, No. 76-1383, cert. granted, 45 U.S.L.W. 3822. Given the remedial purpose of P.L. 94-559, and the important public policies underlying it, the Court should give the act a broad construction consistent with the Congressional intent to do everything within its constitutional power to facilitate private enforcement of the civil rights acts.

3. The "bad faith" of the state defendants in failing to implement a lawful district court order jeopardized the integrity and supremacy of federal court orders, and therefore justified an award of attorney's fees for services necessary to implement the order.

Because the Congressional power and intent to override sovereign immunity is so clear, it should not be necessary for the Court to reach this point. Similarly, if it does reach this point it is not necessary to decide, in general, whether bad faith in unreasonably defending litigation justifies an award of attorney's fees. The bad faith in this case was primarily bad faith in failing to implement a lawful order and judgment of a federal court. See Finney v. Hutto, 410 F.Supp. 251 at 284-85 (D. Ark. 1976). In adopting Article III of the Constitution, the states inherently surrendered to federal courts the power to issue orders necessary to implement their lawful judgments, even when those orders have an effect on state treasuries. E.g., Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927).

In this case, the District Court premised its award of attorney's fees both on its inherent power to award fees in cases in which a party has acted in "bad faith," and on its

power under 42 U.S.C. §1988. The Eighth Circuit affirmed on statutory grounds, but recognized that the record amply supported an award based on the "bad faith" conduct of officials of the Arkansas Board of Correction, 548 F.2d at 742. E.g., Aleyeska, supra, 421 U.S. at 258. See also, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 390 (1923). Sovereign immunity does not shield a state from the Federal imposition of litigation costs attributable to its "bad faith" conduct in failing to implement Federal court orders.

In general, the "bad faith" exception to the American rule on attorney's fees recognizes two categories of litigation expenses: "unavoidable" expenses generated by the operation of a complex dispute-resolution system, and "avoidable" expenses attributable not to the complexity of the dispute-resolution system, but to the unreasonable behavior of one of the litigants. Although American practice, in the absence of statute, burdens each party with its "unavoidable" litigation expenses, the "bad faith" exception permits an American court to charge against an unreasonable litigant the "avoidable" costs attributable to his or her conduct.

The District Court determined (and the Eighth Circuit agreed) that the behavior of the Arkansas Department of Correction had caused avoidable litigation costs; the Court therefore charged those avoidable costs to the entity whose unreasonable conduct had caused them.

Unreasonable state litigation is a burden not only on the parties but also on the limited resources of the Federal judiciary. When a state official fails to implement a lawful order of a Federal court, that failure jeopardizes not only the interests of the plaintiff, but also the interests of the United States in maintaining the integrity and supremacy of Federal court orders. And where, as here, the bad faith of a state agency impedes enforcement of a Federal court order, the court's decision to implement that order through allocation of attorney's fees against that state agency is justified by the same interest that authorizes suits by the United States against a state. E.g., United States v. Mississippi, 380 U.S. 128 (1965); Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974). See also, Rodriguez v. Swank, 496 F.2d 1110 (7th Cir. 1974) (Eleventh Amendment does not bar contempt sanctions to compel compliance with decrees); Class v. Norton, 505 F. 2d 123 (2d Cir. 1974) (same).

In "policing" the litigation process and imposing sanctions for its abuse, Federal courts act as agents of a superior sovereignty, to which the states ceded authority as a necessary consequence of joining the Federal union. Just as the United States Department of Labor may sue a state in Federal court to enforce Federal labor norms and just as the Attorney General of the United States may sue a state in Federal court to enforce voting norms, so a Federal District Court may impose sanctions on a state in the form of an award of attorney's fees to enforce standards of reasonable conduct occasioned by the state's bad faith failure to implement court orders.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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